No. 17-204

In the Supreme Court of the United States

APPLE, INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BSA | THE SOFTWARE ALLIANCE AS *AMICUS CURIAE* SUPPORTING PETITIONER

ANDREW J. PINCUS
Counsel of Record
MICHAEL B. KIMBERLY
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Table of Authorities ii

Interest of the *Amicus Curiae* 1

Introduction and Summary of Argument 2

Argument 5

The Court Should Reaffirm *Illinois Brick*'s Across-The-Board Prohibition On Pass-Through Damages. 5

A. A Wide Variety Of Distribution Models Are—And Will Be—Used To Make Software Available To Ultimate Users. 5

B. Restricting The *Illinois Brick* Rule Could Disrupt These Distribution Models And Deprive Businesses And Consumers Of Access To New Technological Tools. 8

C. *Illinois Brick* Precludes All Claims Based On Pass-Through Damages, Regardless Of the Particular Distribution Model 11

Conclusion 16

TABLE OF AUTHORITIES

CASES

Albrecht v. *Herald Co.*,
390 U.S. 145 (1968) 15

Bell Atlantic Corp. v. *Twombly*,
550 U.S. 544 (2007) 9

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*,
429 U.S. 477 (1977) 9

Dr. Miles Med. Co. v. *John D. Park & Sons Co.*,
220 U.S. 373 (1911) 15

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*,
392 U.S. 481 (1968) ..... *passim*

Hawaii v. *Standard Oil Co. of Cal.*,
405 U.S. 251 (1972) 10

Illinois Brick Co. v. *Illinois*,
431 U.S. 720 (1977) ..... *passim*

Kansas v. *UtiliCorp United, Inc.*,
497 U.S. 199 (1990) 12, 13, 14

Kimble v. *Marvel Entm't, LLC*,
135 S. Ct. 2401 (2015) 13

Leegin Creative Leather Prods., Inc. v. *PSKS, Inc.*,
551 U.S. 877 (2007) 15

Michigan v. *Bay Mills Indian Cmty.*,
134 S. Ct. 2024 (2014) 13

Monroe v. *Pape*,
365 U.S. 167 (1961) 14

Moragne v. *States Marine Lines, Inc.*,
398 U.S. 375 (1970) 13, 14, 15

Payne v. *Tennessee*,
501 U.S. 808 (1991) 14

State Oil Co. v. *Khan*,
522 U.S. 3 (1997) 15

STATUTES

15 U.S.C. § 4 ..... 9, 14

INTEREST OF THE *AMICUS CURIAE*

BSA | The Software Alliance is an association of the world's leading software and hardware technology companies. On behalf of its members, BSA promotes policies that foster innovation, growth, and a competitive global marketplace for commercial software and related technologies. Because a competitive marketplace is vitally important to promoting the innovation that has kept the United States at the forefront of software and hardware development, BSA members have a strong interest in the consistent and technologically neutral application of U.S. antitrust laws.[1]

BSA members are among the Nation's leading technology companies, producing the software that powers computer and telecommunication networks and that is employed by businesses and consumers in virtually every aspect of daily life. By virtue of their business models and the collaborative nature of the software industry, they frequently engage in transactions and arrangements that entail collecting revenue from other businesses that, in turn, interface directly with consumers. They accordingly have a particularly strong interest in the *Illinois Brick* doctrine and the many practical objectives it serves.

---

[1] Pursuant to Rule 37.6, BSA affirms that no counsel for a party authored this brief in whole or in part and that no person other than BSA and its counsel made a monetary contribution to its preparation or submission. The parties' blanket consent letters to the filing of *amicus* briefs have been filed with the Clerk's office.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over forty years—beginning with *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and continuing with *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977)—it has been settled that neither antitrust defendants nor plaintiffs may make use of the concept of pass-through damages.

Hanover Shoe rejected an antitrust defendant's attempt to avoid liability by claiming that the direct purchaser of the product had passed on to its customers the allegedly supracompetitive price it paid. Permitting direct purchasers to recover the entire damages award would, the Court recognized, result in a windfall to direct purchasers, but the Court concluded that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 734-35.

The Court also expressed "an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Id.* at 725.

Illinois Brick, decided nine years later, involved the inverse situation: an indirect-purchaser plaintiff claiming that it had been harmed by the higher prices passed on by the direct purchaser. The Court explained that allowing both direct and indirect purchasers to recover would "create a serious risk of multiple liability for defendants" (431 U.S. at 730): indirect purchasers

would be able to collect damages (trebled) even when direct purchasers relying on *Hanover Shoe* had already had collected damages undiminished by pass-through (trebled). It was "unwilling to open the door to [such] duplicative recoveries" under the antitrust laws. *Id.* at 731.

The *Illinois Brick* Court also emphasized that "[t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions" to determine whether and to what extent supracompetitive prices had been passed through to the indirect purchaser seeking to recover damages. 431 U.S. at 731-732.

The "*Illinois Brick* rule" is thus symmetrical. It preserves standing for a direct purchaser to recover damages for overcharges, whether or not those charges are passed along to downstream customers. And it prevents indirect purchasers, to whom overcharges have been passed on, from seeking recovery for antitrust injuries.

The Ninth Circuit's decision in this case throws this settled understanding into disarray by upholding an antitrust claim seeking to recover pass-through damages. The court of appeals held that end users who purchase smartphone applications from Apple's "App Store"—the app purchasers—may bring suit against Apple for monopolization of the market for app distribution, even though their claims depend on a pass-through theory—*i.e.*, that direct purchasers of Apple's distribution service (app sellers) passed on Apple's commissions to indirect purchasers (app purchasers). The court held that the *Illinois Brick* rule did not apply because Apple was a "distributor" of apps to consumers, and was not the apps' "manufacturer."

The court of appeals expressly acknowledged the possibility that, on its reasoning, app developers might themselves be considered to be direct purchasers of "distribution services" from Apple and thus *also* be entitled to bring an antitrust suit for the same allegedly improper 30% commission that the app purchasers challenge in this suit. Pet. App. 20a. And it ignored the complexity of determining what portion of the 30% commission was borne by app purchasers in the form of higher prices.

In other words, the lower court failed to explain why the concerns that motivated *Hanover Shoe* and *Illinois Brick* do not also preclude the pass-through damages theory here. Its holding should be reversed for three reasons.

First, the lower court's reasoning poses a serious threat to America's 21st-century information economy, in which the provider of an online platform—such as the App Store, a cloud storage service, or any operating system—can and often does serve as an intermediary between end users and sellers of software products and services. If these platform providers are subject to suit not only by the direct purchasers of their services, but also by end users alleging damages based on pass-through theories, their litigation exposure—and litigation costs—could skyrocket. The result would be increased wasteful litigation and reduced innovation.

Second, respondents' pass-through theory of damages is flatly incompatible with this Court's decisions in *Hanover Shoe* and *Illinois Brick*. Those decisions rule out *any* form of pass-through damages, based on well-founded concerns about the problems that would arise if pass-through theories were permitted. This Court has previously declined to recognize exceptions

to the direct purchaser rule based on the structure of particular markets, and it should do so here as well.

Third, stare decisis weighs strongly against retreating from the bright-line rule of *Illinois Brick*. Numerous companies in and outside the technology sector have relied on that rule to predict the legal implications of their business dealings, and their expectations would be considerably disrupted by a ruling making them subject to suit by an entirely new class of parties. There is no reason, let alone a sufficiently compelling one, to abandon *Illinois Brick* and invite these harmful consequences.

ARGUMENT

The Court Should Reaffirm *Illinois Brick*'s Across-The-Board Prohibition On Pass-Through Damages.

Hanover Shoe and *Illinois Brick Co.* establish a categorical rule that antitrust claims based on theories of pass-through damages, such as the theory applied by the court below, are never permissible. Carving out an exception to that rule would pose a grave threat to the many innovative technology companies that are using, and will use in the future as technology develops, a variety of different distribution models to connect consumers and software developers. The judgment below should be reversed.

A. A Wide Variety Of Distribution Models Are—And Will Be—Used To Make Software Available To Ultimate Users.

This case concerns one particular distribution model for digital goods—the "App Store" model, in which numerous app developers are able to sell their apps to consumers in a centralized marketplace main-

tained by a single platform provider (in this case, Apple). But Apple is only one of the many platform providers that use this sort of distribution model; many other platform providers use comparable models to distribute digital products to users—and as technology evolves, new models are devised and implemented.

Cloud computing providers are one important example. In addition to the online information storage solutions they provide, these companies often make third-party software tools available for use in conjunction with the information stored on the platform. A file storage provider, for instance, might enable the use of word processing or other applications on files stored on its system. Such systems allow users to access these additional software tools on an as-needed basis—with access mediated by the provider of the cloud services.

Similarly, software providers—such as the creators of computer operating systems or web browsers—frequently offer users the ability to add "plug-ins" or "add-ons" to their software by downloading those additional software tools to computers or other devices through a centralized "store" or database made available as a feature of the main product (*i.e.*, the operating system or the web browser). Again, consumers obtain the additional products from the developers that created those additional products—but the platform provider acts as the indispensible intermediary in the transaction.

These intermediated arrangements offer compelling benefits for platform providers, third-party software developers, end-users, and the public.

First, this intermediation allows the platform provider to ensure that additional software products are compatible with its platform and that users will

have a high-quality experience. When users obtain software from developers without intermediation, compatibility issues can often arise. To cite just one example, a developer might create its application for use with one version of a system, but fail to make it compatible with later, upgraded versions. And these sorts of compatibility problems can have spillover effects; the digital economy today is characterized by rapid prototyping, testing, iteration, and innovation, and it is essential that the platforms facilitating that economy are both flexible *and* stable.

Second, the platform provider often will have important business reasons for maintaining its direct relationship with users, such as enhancing its ability to market additional products and services. Providing compatible add-on features from third-party developers can be an effective way to accomplish that goal.

Third, intermediated distribution models afford third-party software developers an opportunity to reach the intermediary's customer base more easily. By making their add-on available via the platform provider, third-party software developers can introduce their offerings to new customers.

Fourth, distribution to users by the platform provider ensures that the platform provider can quickly provide users with any updates needed to protect customers' security or the functionality of software tools. For example, a security vulnerability found in a particular application can be quickly brought to the attention of users and addressed.

Finally, and relatedly, a digital distribution model promotes security by guarding against the possibility that faulty or compromised applications will make it to users in the first place. Platform providers like Apple

are able to impose rigorous security requirements on applications that must be met before applications can be sold or distributed through their platforms. And if applications are later found to be malicious, they can be quickly deleted from the platform, limiting their ability to affect additional users.

In sum, although this case involves Apple's app store—and the relationship between Apple, app users, and app developers—the type of distribution model employed here can be and is replicated in the context of other software products and services.

B. Restricting The *Illinois Brick* Rule Could Disrupt These Distribution Models And Deprive Businesses And Consumers Of Access To New Technological Tools.

1. Consumers and the economy at large benefit from digital distribution models that deviate from the manufacturer-versus-distributor distinction that may be present in other economic sectors. But the Ninth Circuit's view of the *Illinois Brick* rule would permit antitrust suits against "distributors"—even when consumer-plaintiffs are relying on a pass-through theory of damages.

The threat of duplicative antitrust liability would deter platform providers and other businesses in the information technology sector from using those models to connect users and software tool developers. The court of appeals' rigid application of its manufacturer-versus-distributor distinction thus poses a serious threat to the viability of the many new and innovative distribution models for goods and services being used in the information economy. This Court should reject that approach.

Under the Ninth Circuit's holding below, platform providers can now be sued *both* by purchasers alleging that they directly purchase goods or services from the providers *and* by third-party developers alleging that they purchase "distribution services" from the providers. That prospect of duplicative liability is anything but hypothetical: indeed, the lower court acknowledged it as a potential consequence of its ruling in this case—even though it is the precise result that the *Illinois Brick* rule is supposed to prevent.

The problem of multiple recoveries is compounded by the fact that the antitrust laws already provide for multiplied damages: Congress provided that an antitrust plaintiff is entitled to recover three times the amount of any damages proven. 15 U.S.C. § 4. Congress considered that particular level of damages appropriate to remedy antitrust violations and to "penaliz[e] wrongdoers and deter[] wrongdoing." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

Allowing multiple recovery in antitrust cases would create the possibility of *sextupled* damages—thus creating a damages regime that differs considerably from what Congress intended. The massive potential liability inherent in a system permitting multiple recovery would also encourage more *in terrorem* lawsuits and settlements. This Court observed in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007), that the treble damages and significant discovery expenses involved in antitrust cases can "push cost-conscious defendants to settle even anemic cases before" they reach summary judgment or trial. If that is true under a system permitting one recovery of treble damages, it would be even more true of a system of multiple liability.

Given the undesirability and unfairness of multiple antitrust liability, the Court in *Illinois Brick* declared itself "unwilling to 'open the door to duplicative recoveries'" under the antitrust laws. 431 U.S. at 731 (quoting *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972)). It should do the same here.

2. That result is especially appropriate because multiple liability is not the only threat posed by the court of appeals' approach. This Court has explained that "[t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions * * * [and] the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick*, 431 U.S. at 731-732. Those same problems would result from the offensive use of a pass-through theory of damages. *Ibid.*

Antitrust cases already involve complex factual and economic issues, which make these claims extremely expensive to litigate. The court of appeals' rule will further complicate these actions "with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Illinois Brick*, 431 U.S. at 725.

It would be surpassingly difficult for a jury to determine how much an input overcharge increased downstream prices. And even if there were evidence that the entire overcharge was passed on, the jury would have to determine whether a direct purchaser suffered harm from decreased sales. Determining price elasticity and weighing the other factors involved in calculating the net effect on profits caused by supra-

competitive pricing of a single input would almost certainly be impossible.

The additional litigation costs associated with such issues—and the very significant risks that a jury will be unable to follow the parties' arguments—will further increase the pressure on defendants to settle even non-meritorious claims.

C. *Illinois Brick* Precludes All Claims Based On Pass-Through Damages, Regardless Of the Particular Distribution Model.

1. Even if it might be thought to be desirable, from a policy standpoint, to adopt the manufacturer-versus-distributor distinction suggested below—and as we have shown, it clearly is not—that distinction cannot be reconciled with *Illinois Brick*. No part of the *Illinois Brick* rule depends on the particular positions that the plaintiff and the defendant occupy in the marketplace.

Rather, *Illinois Brick* addressed—as a categorical matter—what rule "is to be adopted regarding pass-on in antitrust damages actions." 431 U.S. at 728. It held that pass-through theories of liability are never permissible because of the difficulties they create for courts and the possibility of multiple liability.

That focus on economic substance, rather than labels, makes good sense: Regardless whether the defendant in an antitrust case is deemed a "manufacturer," a "distributor," or something else, a theory of the case that relies on pass-through damages presents the same practical and policy concerns that *Illinois Brick* sought to avoid.

To the extent that respondents argue that digital distribution models like Apple's App Store present less complicated pass-through analyses than other market

models, that argument is precluded by this Court's precedents. The Court considered and rejected that same contention in *Kansas* v. *UtiliCorp United, Inc.*, 497 U.S. 199 (1990).

There, two States acting as *parens patriae* brought an antitrust lawsuit on behalf of consumers against a gas pipeline company and several gas production companies, alleging that they fixed prices. *Id.* at 204-05. The lower courts held that this consumer lawsuit was barred by *Illinois Brick* because consumers did not purchase gas directly from the gas suppliers, and that the proper plaintiffs were the gas utilities that purchased directly from the suppliers. *Id.* at 205.

Before this Court, the States argued that the Court should make an exception to the *Illinois Brick* rule for "cases involving regulated public utilities that pass on 100 percent of their costs to their customers," arguing that in such cases, *Illinois Brick*'s concerns about the difficulty of apportioning passed-through costs and the potential for multiple recovery were obviated. *Id.* at 208. But this Court declined to do so. It held that although "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," "ample justification exists for our stated decision not to '"carve out exceptions to the direct purchaser rule for particular types of markets,'" because "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216 (brackets omitted) (quoting *Illinois Brick*, 431 U.S. at 744).

Indeed, the Court explained, the very process of "classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the [direct purchaser] rule was

meant to avoid." *Ibid.* (quoting *Illinois Brick*, 431 U.S. at 744-45).

UtiliCorp's analysis applies with equal force here. Whatever the particular features of Apple's App Store, or of digital distribution models in general, they do not justify departing from *Illinois Brick*'s general rule against pass-through damages. Creating an exception to that doctrine for digital intermediaries like Apple could open the floodgates to a host of similar exceptions, "undermin[ing]" the rule (*ibid.*) and bogging courts down in the very complicated pass-through determinations that *Illinois Brick* precludes.

2. *Stare decisis* also weighs heavily against recognizing any exceptions to the *Illinois Brick* rule. The Court has often observed that *stare decisis* "is 'a foundation stone of the rule of law.'" *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). That is so for three reasons.

First, adhering to prior precedents is essential to "maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). By committing generally to follow prior decisions rather than routinely calling them into question, courts foster public confidence in the integrity and impartiality of the judicial process.

Second, *stare decisis* "further[s] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." *Ibid.* It would be inefficient, to say the least, if litigants used every new case implicating an issue as an opportunity to argue for revisiting old rulings. *Stare decisis* forecloses

such lines of argument, allowing courts and litigants to focus their attention on other subjects.

Finally, *stare decisis* aids the law in "furnish[ing] a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Ibid.* The purpose of a system of laws is to enable individuals and businesses to predict what the law requires of them, so that they can plan their affairs effectively.

A key component of the predictability of the law is the assurance provided by *stare decisis* that settled precedents can be relied upon not to change. The Court is therefore especially reluctant to overturn existing precedents when "individuals may have arranged their affairs in reliance on the expected stability of decision"—as is often true in "area[s] of commercial law." *Monroe* v. *Pape*, 365 U.S. 167, 221–22 (1961) (Frankfurter, J., dissenting in part); see also, *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved.").

These rationales apply strongly with respect to the direct purchaser rule of *Hanover Shoe* and *Illinois Brick*. That rule is one of the most venerable doctrines in antitrust law. This Court has affirmed it on multiple occasions. See *Illinois Brick*, 431 U.S. at 736 (declining to "overrule *Hanover Shoe*"); *UtiliCorp*, 497 U.S. at 217 ("Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of [Clayton Act] § 4.").

Numerous businesses have ordered their affairs in light of the rule, by operating on the understanding that they would not be exposed to liability for double

(actually sextuple) antitrust damages as a result of potential pass-through liability, regardless how they organized their supply and distribution chains. Departing from *Hanover Shoe* and *Illinois Brick* here would thus disrupt the stability of this Court's precedents—and the settled expectations of businesses across the country.

Creating an exception to the direct purchaser rule would also lead to considerable "relitigation" (*Moragne*, 398 U.S. at 403) of the doctrine in future cases, as increasing numbers of antitrust plaintiffs would argue that some particular characteristic of their markets, too, justify an exemption from *Illinois Brick*'s formerly bright line rule. The new information economy, as we have shown, will create even more opportunities for courts to craft such exemptions, because it is ever more common for users of digital goods and services to purchase them through intermediaries. The resulting flood of litigation, and the associated increase in antitrust exposure for digital companies, will redound to the detriment of consumers.

To be sure, this Court has overturned prior antitrust decisions—but it has done so only when those decisions have been shown to be ill-reasoned or otherwise "flawed." See *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 900, 904 (2007) (overturning *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), which had been "called into serious question" and repudiated by the government); see also, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997) (overturning *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), because "we find its conceptual foundations gravely weakened").

Here, by contrast, the reasoning underlying *Illinois Brick* is as strong today as it was when the case was decided.

This Court need not and should not invite these harmful consequences by holding that a digital "distributor" like Apple is somehow outside the reach of *Illinois Brick*. The Court should instead reverse the decision below and reaffirm that *Illinois Brick* prohibits claims of all kinds resting on a pass-through damages theory.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
MICHAEL B. KIMBERLY
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

AUGUST 2018